Supreme Court, U. S.
FILED
JUL 15
MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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NO. 75-1591

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MELVIN YOUNG,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES The State of Texas, Respondent herein, by and through its duly authorized Attorney General, and files this its Brief in Opposition.

QUESTIONS PRESENTED

I. Whether it is a denial of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States for a probation officer to have a greater caseload than that recommended by the Texas Legislature.

II. Whether a probationer's due process rights would be denied by an alleged non-delivery of probation supervision services in return for a judicially mandated fee.

III. Whether the standard of proof applied to Petitioner's revocation of probation was violative of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States.

2. The Fourteenth Amendment to the Constitution of the United States.

3. Article 42.12, Texas Code of Criminal Procedure, entitled "Adult Probation and Parole Law". Specifically, the following portions of that statute:

"Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. . . .

* * *

"Sec. 6a. (a) A court granting probation may fix a fee not exceeding $10 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation. . . .

* * *

"Sec. 10. For the purposes of providing adequate probation services, the district judge or district judges having original jurisdiction of criminal actions in the county or counties, if applicable, are authorized, with the advice and consent of the commissioners court as hereinafter provided, to employ and designate the titles and fix the salaries of probation officers, and such administrative, supervisory, stenographic, clerical and other personnel as may be necessary to conduct pre-sentence investigations, supervise and rehabilitate probationers, and enforce the terms and conditions of probation. . . .

* * *

"It is the further intent of this Article that the caseload of each probation officer not substantially exceed seventy-five probationers. . . ."

STATEMENT OF THE CASE

Melvin Young, Petitioner herein, was convicted of burglary in the 30th District Court of Wichita County, Texas, after entering a plea of guilty. Punishment was

assessed by the court at six years in the Texas Department of Corrections; however, imposition of the sentence was suspended and Petitioner was placed on probation for six years.

Subsequent to his conviction and during the probationary period, on October 31, 1974, the State filed a motion to revoke probation, alleging that Petitioner had violated the terms of his probation. The State filed an amended motion to revoke probation on November 19, 1974.

A hearing was held on November 27, 1974, whereby the trial judge determined that the Petitioner had violated the terms of his probation and revoked the probation.

Petitioner appealed this revocation of probation to the Texas Court of Criminal Appeals, which affirmed the revocation by per curiam opinion. *Young v. State*, No. 50,935 (January 21, 1976).

STATEMENT OF FACTS

At the time Petitioner was granted probation, he was placed under certain terms and conditions by the court. Among these were stipulations that he:

> "(1) Shall commit no offense against the penal laws of this state or any other state or the United States, and shall not be convicted of any offense in violation of the penal laws of this state or any other state or the United States, and shall violate no penal ordinances of any political subdivision of this state or any other state, and shall not be convicted of any offense in violation of the penal ordinances of any political subdivision of this state or any other state.

* * *

> "(9) Shall report in person or in writing to the assigned probation officer in and for Wichita County, Texas, (or his successor in office) at least once each 30 days or as directed by the court or the probation officer.

* * *

> "(12) Shall pay a total of $63.50 for all costs of court incurred herein, including the $25.00 fee for court appointed attorney.
>
> "(13) Shall pay a monthly probation service fee of $8.00 through the Wichita County probation department, with the first payment due on the 16th day of April, 1972, and a like payment due on the same day of each month that this sentence is in effect."

On September 12, 1974, Petitioner was observed by police officers in Wichita County, Texas, traveling at a high rate of speed in a pickup truck. The officers, in two marked police cars, pursued Petitioner for approximately six blocks before one car turned in front of him, thereby forcing him to stop. During the chase, Petitioner ran a red traffic light and made one turn. Both police cars had their lights flashing and one had its siren on. When the officers approached the truck, one of them observed a machete in plain view in the cab of the truck. Petitioner was then placed under arrest for unlawfully carrying a weapon. The officers also saw some shotgun shells on the dashboard and discovered a shotgun behind the seat.

As a result of this arrest, a motion to revoke probation was filed by the State, alleging that Petitioner had violated the terms of his probation, in that he:

"(1) Committed the offense of unlawfully carrying weapons in Wichita County, Texas, Section 46.02, Texas Penal Code, in that on or about September 12, 1974, Defendant had in his possession an illegal knife, to-wit, a machete having a blade of over 5-1/2 inches.

"(2) Failed to report regularly to his probation officer.

"(3) Paid only $11.60 on his court costs of $63.50.

"(4) Paid only $37.00 in probation fees in the last two years and seven months, leaving an arrearage of $248.00."

On November 19, 1974, an amended motion to revoke probation was filed, alleging further that the Petitioner had committed the offense of eluding a police officer on September 12, 1974.

ARGUMENT AND AUTHORITIES

I. Whether It Is A Denial Of Due Process And Equal Protection Under The Fifth And Fourteenth Amendments To The Constitution Of The United States For A Probation Officer To Have A Greater Caseload Than That Recommended By The Texas Legislature.

The Texas Legislature has not required that a caseload be limited to 75 probationers, but merely recommended that each probation officer's caseload not be substantially more than 75. It is patently frivolous for Petitioner to argue that his equal protection rights were violated because his probation officer had a greater caseload than that *recommended* by the Texas Legislature.

It is difficult to perceive how Petitioner's due process rights were violated, since the Constitution of the United States simply guarantees that Petitioner not be denied his liberty without due process of law. The probation revocation process in Texas meets all the due process standards for revocation set forth in *Gagnon v. Scarpelli*, 411 U.S. 788 (1973). All of those requirements were afforded to Petitioner at each step of the probation revocation proceedings. He had (1) written notice of the claimed violations[1]; (2) disclosure of the evidence to be used against him; (3) the opportunity to be heard in person and to present witnesses; (4) a hearing before a neutral and detached magistrate; (5) written findings supported by evidence, relied upon to revoke his probation; and (6) counsel to represent him at all steps of the proceedings. *Cf., Morrissey v. Brewer*, 408 U.S. 471 (1972).

Finally, there has been no showing in this case, nor could there be, that Petitioner was harmed in any manner. The Constitution of the United States does not require the states to maintain probation systems. The theory behind probation is to give a first offender a second chance within the criminal justice system. The State, in providing a probation officer, is not guaranteeing that probation supervision will prevent violations of the conditions of probation and hence revocation of probation. The desire and impetus for compliance with conditions of probation must come from the probationer. It is stretching imagination to

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[1]The state made an oral amendment to the motion to revoke probation at the commencement of the revocation hearing to include the unlawful carrying of a shotgun. However, the Texas Court of Criminal Appeals, in affirming the revocation, did not consider the evidence concerning the shotgun in that there was other evidence sufficient to support the revocation of probation.

believe that, if Petitioner's probation officer had a caseload of 75 probationers, Petitioner would neither have attempted to elude the police nor unlawfully carried a weapon. Under Texas law:

> "[t]he lack of supervision does not justify a violation of the law or the failure to live up to the terms of probation." *Mullins v. State*, 464 S.W.2d 669, 670 (Tex.Crim.App. 1971).

II. A Probationer's Due Process Rights Are Not Denied By The Alleged Non-Delivery Of Probation Supervision Services In Return For A Judicially Mandated Fee.

The proof at his revocation hearing showed that Petitioner had paid a very small portion of the assessed probationary fee. Further, Petitioner had failed to report to his probation officer. The Texas Court of Criminal Appeals did not consider those two alleged violations of probation in affirming the revocation. In fact, the State on appeal conceded that the trial court abused its discretion in finding that the Petitioner had violated the terms of his probation by failing to pay such fees. Therefore, it is difficult to perceive how Petitioner was harmed or how a constitutional question is presented by the alleged non-delivery of probationary supervision after payment of a small portion of the supervisory fees. As previously stated, the alleged lack of supervision, even in light of a few fee payments, cannot justify Petitioner's actions in violating the terms of probation.

III. Findings Based On A Preponderance Of The Evidence Meet The Constitutionally Required Standard Of Proof In Probation Revocation Hearings.

A revocation of probation is an exercise of the broad discretionary power of the trial court. The standard of proof is less than would be required for a conviction, for the question is no longer the guilt or innocence of a defendant, but rather, whether he has complied with the conditions imposed by the court after his initial conviction. The evidentiary standard has been set forth by the United States Court of Appeals for the Fifth Circuit as follows:

> "Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. Probably evidence rising to the level of substantial evidence is not even required, absent arbitrary and capricious action in the revocation. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation. United States v. Langley, 438 F.2d 91 (5th Cir. 1970); Manning v. United States, 161 F.2d 827 (5th Cir. 1947). On review, an action of the trial court revoking probation will not be disturbed in the absence of a clear showing of abuse of discretion."
> *United States v. Francischine*, 512 F.2d 827, 829 (5th Cir. 1975), *cert. denied*, ____ U.S. ____, 96 S.Ct. 284 (1975).

In Petitioner's own case, the Texas Court of Criminal Appeals applied the same standard:

> "Appellant challenges the sufficiency of the evidence to support each of the court's findings that appellant violated the terms of his probation in the five respects alleged and found

by the court. Such findings must be based on *a preponderance of the evidence.* Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974).

* * *

"[T]his Court has said that the trial court does not have absolute discretion arbitrarily to revoke probation. Campbell v. State, 476 S.W.2d 918 (Tex.Cr.App. 1970); Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974). The limitation suggested by *Campbell* and *Scamardo,* however, related only to the requirement of some showing of a violation of a condition of probation. That showing has been made in this case. We know of no better office in whom to vest the determination of 'the best interests of society' than of the trial judge, and have been shown no authority that would indicate otherwise. Certainly this Court cannot conclude in the instant case that the trial judge abused his discretion in this regard." *Young v. Texas,* No. 50,935 (Tex.Crim.App., January 21, 1976). (Emphasis supplied.)

In sum, a constitutionally sufficient standard of proof was applied to Petitioner's revocation of probation. Moreover, the proof at Petitioner's revocation hearing clearly showed that he had violated at least one condition of his probation. Therefore, there is no showing that Petitioner was denied due process or equal protection.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Respondent, and do hereby certify that three copies of the foregoing Respondent's Brief in Opposition have been served by placing same in the United States Mail, first class, certified and postage prepaid, on this the _____ day of July, 1976, addressed to: Barbara C. Crampton, Attorney for Petitioner, 505 Lamar, Wichita Falls, Texas 76301.

JOE B. DIBRELL, JR.
Assistant Attorney General